ties is, that whenever the cargo may, on account of injuries from perils insured against, be abandoned as for a total loss, memorandum articles stand upon the same footing as others. There is much diversity on the subject of deterioration of the class of articles and the effect of a total change of their character, although they remain nominally in species the same, as incurring liability on part of the insurers. But, as the question does not properly arise here, we express no opinion on the subject. We do not think the assignment of error thus noticed is sustained, and accordingly we overrule it.

5. We do not see any practicable difficulty under the tenth error, because the loss of both vessel and cargo may be treated as total, if the evidence was believed, and they both belonged to the same party. The doctrine of contribution in payment of the bottomry bond does not arise in that form here, in which it might, and undoubtedly would, in cases of partial loss, or between separate owners.

6. Neither is the eleventh error sustained. It was truly said by the counsel for the defendants in error, that the provision in a policy for ascertaining a loss, by a separation of the damaged from undamaged articles, applied only to the cases of partial, not to a total loss, constructive or absolute; for so it expressly appears in the conditions attached to the policy. Discovering no error in any part of this record, the judgment is affirmed.

C. Ingersoll, Esq., for plaintiffs.
J. Hill Martin, Esq., and
Geo. M. Wharton, Esq., for defendants.

In the Supreme Court of Illinois, April Term, 1860.

HORACE NORTON ET AL. *vs.* JEREMY HIXON.

1. When the sheriff, who attaches a vessel and allows her to go into the hands of third parties, who use her and finally sell her, both the sheriff and such third parties will be treated as trustees for all the parties interested in the property, and in case the attaching creditor procures a judgment in the attachment suit, he may compel the sheriff and the parties having the earnings and proceeds of the vessel to account for the same and have them applied to the payment of his judgment.

2. A Court of Chancery has jurisdiction in such case, although the earnings and proceeds might have been reached by a garnishee, it furnishing a much safer and more efficient remedy, and the funds being treated as trust funds.

The opinion of the Court, in which all the facts appear, was delivered by

SIDNEY BREESE, J.—This case seems, from the allegations in the bill, to be this: The appellee, being a creditor of the Lexington Fire, Life, and Marine Insurance Company, sued out an attachment, which was levied by Sheriff Church, on a vessel called the Buena Vista, as the property of the Company; that the sheriff put her in the possession of Norton, Walters & Rogers, to be run either for his and their joint benefit, or for their benefit alone; that Norton & Co., during all the season, since the vessel came into their possession, used and ran her for the carriage of merchandise, lumber, and other cargoes and freights for him, and that in such business she was worth, had earned, or ought to have earned, over and above expenses of navigating her, $2,500 in each of the years they had possession, that is during the years 1852–3–4–5–6, and up to the time of filing the bill, and since doing so; that in those years she had earned or should have earned $1,300, which ought to be applied to the payment of complainant's (appellee's) judgment; that the complainant has no means of ascertaining these facts without a discovery from Church, Norton & Co., and each of them; that they neglect or refuse to account for the earnings or bring them into court, or to produce the vessel to answer the judgment, claiming that the earnings and property are subject to the payments of the judgment and costs; that Norton & Co. claim to have sold the vessel, but to whom or for how much, he is ignorant. These are the principal allegations in the charging part of the bill; and they are followed by the prayer that the defendants may each of them answer under oath "whether the Buena Vista, her anchors, chains, riggings, and sails were not attached by said Church, as sheriff, upon the writ of attachment in favor of complainant and taken into his possession; and whether he did not let or put the same, and when, into the hands or possession of said Norton & Co.; whether she has not been run by them or by their consent or direction; and whether they have not sold her, and

to whom, and on what terms and conditions, and for how much, and in what travel, and for what freight she has been run, and for what amount of freight she has earned since said letting, and in the prayer for proofs, and that your orator may have such other and further or different relief in the premises as to equity and good conscience shall seem meet?"

It will be observed, no relief of any kind is prayed by the bill, to which the prayer for other and further or different relief could apply, and it was, therefore, demurrable for want of form, had the point been made: there is no specific prayer that the proceeds of this vessel be applied to the payment of this judgment, yet that is manifestly the scope and purpose of the bill, and we can carry out that purpose if the prayer of the bill does not forbid; that it does not is evident. The Court would decree according to the case made by the bill. We do not understand these allegations of the bill as the appellant seems to understand them; that the appellee claims the legal title to the vessel attached, but rather as the general ownership was in the defendant in attachment, he had an equitable interest, by means of his levy, to the extent of his judgment, and the sheriff had a special property in the vessel subject to the rights of all contending parties, and if the vessel was not produced to satisfy his judgment, but was let out and hired to others by the Sheriff, he was entitled to an amount for her net earnings and to have his judgment paid out of them, or if sold out of the proceeds of said sale. This seems to us to present a plain case for the interposition of a court of equity, one of whose familiar subjects of jurisdiction and cognizance is the execution of trusts, and although a court of law might, in a circuitous and expensive mode, afford a remedy by garnishment, yet it would not be so searching and effectual as a chancery bill either in form or substance, and, therefore, the objection that no mutuality of dealings is shown can have no influence. It is a bill to get at the proceeds of property on which the appellee had an effectual lien while in the hands of the Sheriff, and which he, by his own wrongful act, put in the possession of the co-defendants, who made large profits by the use of it, and then sold it for a large sum of money. See 2 Story's Equity Juris. 695.

The principle is thus stated on which this bill can be maintained. When a trustee or other person, standing in a fiduciary relation, makes a profit out of any transaction within the scope of his agency or authority, that profit belongs to his cestui que trust, for it is a constructive fraud upon the latter to employ that property contrary to the trust, and to retain the profit of such misapplication by operation of equity; the profit is immediately converted into a constructive trust in favor of the one entitled to the benefit, nor is the doctrine confined to trustees, strictly so called; it extends to all other persons standing in fiduciary relations to the party, whatever the relation may be.

But upon the ground of fraud, as well as trust, the jurisdiction of chancery in the case cannot be questioned in regard to fraud actual or constructive. Courts of equity have adopted broad and comprehensive principles in exercising their remedial justice in favor of innocent persons who are sufferers by it, without any fault on their part. For this purpose they will convert the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense by way of equitable trust or lien, and a fraudulent purchaser will be held a mere trustee for the honest but deluded and cheated vendee. 2 Story's Eq. Jur. 698. We do not well see how the parties could be reached, except by a proceeding in chancery, when this vessel, its earnings, and avails can be subjected to the appellee's equity. The appellee has a legal title to the vessel, nor is there any priority of contract or of estate between him and the appellant which he can assert in a court of law, and his remedy must of necessity be in equity. These views sustain the ruling of the Court in allowing the exceptions to the appellant's answer; on their being allowed and the answer adjudged insufficient, the appellants were allowed time within which to file a further answer, which they did not choose to do, and on their failure, the bill was taken for confessed, and the matters referred to the masters, who, on proof being heard, reported to the court, on which the decree was entered. This was all regular and in strict conformity with the statute. The amount found is sustained by the proof. The refusal of the Court to set aside the default was a matter of discretion in the Superior Court; but if it was not,

it is one of the essential requisites, when a default of this character is sought to be set aside, that the motion shall not only be founded on an affidavit, but a full and perfect account shall accompany it. We have looked into this answer and find it obnoxious to several of the exceptions taken to the first answer. It does not show an account of their dealings with the vessel from the time she came into their hands, nor of the sale to Boyce and Fisk or of the five thousand dollars they paid for her, nor do they show what her earnings were after Boyce had sold her. On a rule for a further answer the party files a defective or insufficient answer at his peril. The decree of the Court below is affirmed.

NOTICES OF NEW BOOKS:

PRINCIPLES OF THE LAWS OF SCOTLAND. By GEORGE JOSEPH BELL, Professor of the Law of Scotland, in the University of Edinburgh. The fifth edition by Patrick Shaw, Advocate. Edinburgh: T. & T. Clark, Law Booksellers, 38 George street; London: Stevens & Norton, and Simpken & Co.; Glasgow: J. Smith & Son. 1860. Pp. 896.

This valuable work on Commercial Law has always maintained the first rank with the profession. The late Mr. Bell, a most indefatigable student and teacher of youth, carried through the press, prior to his death, four editions of this book. This edition has been edited by Mr. Shaw, who is a brother-in-law of the author, and contains all the manuscript annotations that the author had added, and much additional matter, drawn from the recent sixth edition of Bell's Commentaries.

It is nominally called Principles of the Law of Scotland, but it is really a treatise on Commercial Law, in its largest sense. Much of the Law of Scotland is drawn from the Roman Civil Law. And all modern Commercial Law is largely indebted to the same source, although the Common Law lawyers have somewhat sparingly admitted it. Much of the boasted wisdom of the Common Law found its well-spring in the pages of the Digest or the Code. The real value, the downright practical, every-day use of the principles and maxims of the Civil Law are now just beginning, mainly through the diligence of German and French scholars, to find a home and a congenial cultivation with the disciples of Coke and Blackstone. The accomplished historian of jurisprudence tells us: